KEY PROVISIONS OF THE ADA AMENDMENTS ACT OF 2008

BRIAN EAST
AUSTIN, TEXAS
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1. Mitigating measures are not considered in assessing disability

a. The ADA Amendments Act overturns the mitigating-measures analysis; disability must now be assessed without considering mitigating measures. ADA Amendments Act, page 9 lines 14–17.[1]

i. The findings disapprove of the *Sutton* trilogy. Page 3, lines 1–6.

ii. One expressed purpose is to reject *Sutton*'s mitigating-measures analysis. Page 4, lines 10–15.

iii. The new law eliminates two findings in the original ADA that the Supreme Court relied on[2] for its mitigating-measures analysis. Page 6, lines 10–22.[3]

iv. The legislative history is consistent.[4]

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[1] Some of the references to "sections" in the final version of ADA Amendments Act of 2008 are to sections of that Act, and some are placement instructions referencing "sections" in the original version the ADA. To avoid confusion, when referring to specific provisions of the final ADA Amendments Act of 2008, this paper cites the page and line numbers of the official pdf version of S. 3406 ES, which is attached.

[2] *Compare Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 484 (1999) ("findings enacted as part of the ADA require the conclusion that Congress did not intend to bring under the statute's protection all those whose uncorrected conditions amount to disabilities."); *id.* at 494 (J. Ginsburg, concurring).

[3] *See also* the Statement of the Senate Managers to S.3406 [hereafter "Managers Statement"], 154 Cong. Rec. at S8840 (Sep. 16, 2008); Statement of Sen. Hatch, 154 Cong. Rec. at S8354 (Sep. 11, 2008).

[4] *See, e.g.*, Managers Statement at S8842; Statement of Sen. Harkin, 154 Cong. Rec. at S8349 (Sep. 11, 2008) ("Sutton trilogy . . . is in complete contradiction to congressional intent as we expressed in our committee reports."); Statement of Rep. Miller, 154 Cong. Rec. at E1841 (Sep. 17, 2008) (the law "ensures that individuals who reduce the impact of their impairments through means such as hearing aids, medications, or learned behavioral modifications will be considered in their unmitigated state."); *id.* (Act protects people "who have successfully managed a disability, ending the catch-22"); Statement of House Majority Leader Hoyer, 154 Cong. Rec. at H8293 (Sep. 17, 2008).

b. Mitigating measures are defined very broadly, page 9 line 17–page 10 line 7, and the definition includes a non-exhaustive list.[5]

c. But mitigating measures do *not* include "ordinary eyeglasses or contact lenses." Page 9 lines 21–22; page 10 lines 8–17.

i. In other words, whether or not a person's vision is substantially limited may be assessed in light of his or her eyeglasses.

ii. However, an employer cannot use qualification standards, employment tests, or other selection criteria based on an individual's uncorrected vision unless it is job-related and consistent with business necessity. Page 12, lines 12–25.

iii. Thus, "if an applicant or employee is faced with a qualification standard that requires uncorrected vision (as the sisters in the *Sutton* case were), an employer will be required to demonstrate that the qualification standard is job-related and consistent with business necessity." Managers Statement, 154 Cong. Rec. at S8842.[6]

2. Broad interpretation of disability.

a. In general, disability is now to be broadly interpreted.

i. The Rules of Construction require that the definition of disability "shall be construed . . . in favor of broad coverage of individuals . . . to the maximum extent permitted by the terms of this Act." Page 8 line 20–page 9 line 6.[7]

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[5] The list of mitigating measures in the Act uses the words "such as," page 9 line 17B18, indicating that the list is illustrative only, not exhaustive. *Bragdon v. Abbott*, 524 U.S. 624, 639 (1998) ("the [ADA's] use of the term 'such as' confirms [that] the list is illustrative, not exhaustive."). *See also* Managers Statement, 154 Cong. Rec. at S8842.

[6] *See also* Statement of Rep. Miller, 154 Cong. Rec. at E1841 ("Our clarification regarding the provision of modifications [in regarded-as cases] does not shield qualification standards, tests, or other selection criteria from challenge by an individual who is disqualified based on such standard, test, or criteria. As is currently required under the ADA, any standard, test, or other selection criteria that results in disqualification of an individual because of an impairment can be challenged by that individual and must be shown to be job-related and consistent with business necessity or necessary for the program or service in question.").

[7] The legislative history is fully consistent. *See, e.g.*, Managers Statement, 154 Cong. Rec. at S8841; *id.* at S8842 (recognizing "the general rule that civil rights statutes must be broadly construed to achieve their remedial purpose."); Statement of Rep. Miller, 154 Cong. Rec. at E1841 ("the scope of protection [is] to be generous and inclusive."); Statement of Rep. Hoyer, 154 Cong. Rec. at H8292 ("Civil rights bills are intended to be interpreted broadly."); *id.* at H8293 ("By voting for final passage of the ADA Amendment Act, we ensure that the definition of disability will henceforth be construed broadly and fairly."); Statement of Rep. Jackson-Lee, 154 Cong. Rec. at H8296 (Sep. 17, 2008) ("The Court's treatment of the ADA is at odds with judicial treatment of other civil rights statutes, which usually are interpreted broadly to achieve their remedial purposes."); Statement of Sen. Hatch, 154 Cong. Rec. at S8354 ("the bill directs that the definition of disability be construed in favor of broad coverage. This reflects what courts have held about civil rights statutes in general").

ii. The Act expressly disapproves of *Toyota Motor v. Williams*. Page 3, lines 7–11 and lines 16–20.

iii. Proof of disability should no longer require extensive evidence. The Act explicitly states that the primary subject in ADA cases "should be whether [covered entities] have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis." Page 5 line 13–page 6 line 2.

b. Substantial limitation is broadly interpreted

i. The Act states that the *Toyota Motor* standard for assessing "substantially limits," both in the Supreme Court and as applied by lower courts in numerous decisions, "has created an inappropriately high level of limitation necessary to obtain coverage under the ADA." Page 5 lines 13–20.

ii. The Act rejects the holding in Toyota Motor "that the term[] 'substantially' … in the definition of disability under the ADA 'need[s] to be interpreted strictly to create a demanding standard for qualifying' as a disability." Page 5 lines 1–7.[8]

iii. The Act rejects the *Toyota Motor* view that "substantial" requires proof of a severe restriction. Page 5 lines 1–12.[9]

iv. The Findings also disapprove the EEOC Title I regulation defining the term "substantially limits" to mean "significantly restricted," finding that it sets too high a standard. Page 3 line 22–page 4 line 2. One explicit purpose of the new law is to reject that standard. Page 6, lines 3–8.[10]

v. An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. Page 9, lines 11–13.

c. The definition of "major life activities" is expanded.

i. One purpose of the new law is to reject the analysis in *Toyota Motor v. Williams* that:

[8] *See also* Statement of Rep. Baldwin, 154 Cong. Rec. at H8297 (Sep. 11, 2008).

[9] *See also* Statement of Rep. Baldwin at H8297.

[10] *See also* Managers Statement, 154 Cong. Rec. at S8843 ("We also expect that the [EEOC] will revise the portion of its ADA regulations that defines 'substantially limits' . . . given the clear inconsistency of that portion of the regulation with the intent of this legislation."); Statement of Sen. Harkin, 154 Cong. Rec. at S8350 (similar).

(1) the term "major" in the ADA's definition of disability must be interpreted strictly to create a demanding standard for disability, page 5 lines 1–7, and

(2) the term refers only to "activities that are of central importance to most people's daily lives." Page 5 lines 1–12.

ii. Major life activities "include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." Page 7 lines 17–23.

iii. "Major life activities" also include "the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions." Page 7 line 24–page 8 line 5.

iv. "Both the list of major life activities and major bodily functions are illustrative and non-exhaustive, and the absence of a particular life activity or bodily function from the list does not create a negative implication as to whether such activity or function constitutes a 'major life activity' under the statute." Managers Statement, 154 Cong. Rec. at S8842.

v. Only one major life activity need be limited—An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability. Page 9, lines 7–10. This confirms that only one major life activity need be impacted, and that an individual is not excluded from coverage because of an ability to do many things, as long as the individual is substantially limited in one major life activity.

d. **Impairment**—Although the Act does not include a definition for the term "impairment," the legislative history supports the EEOC's current regulatory definition of the term. Managers Statement, 154 Cong. Rec. at S8841.[11]

3. **Regarded As**—The "regarded as" prong is changed substantially, in two different ways.

a. **Regarded-as disability only requires proof of an impairment**

i. "Regarded as" simply requires proof of an actual or perceived impairment; there is no requirement that the impairment be limiting in any way (either actually or perceived). Page 8 lines 6–15.

[11] The current EEOC definition of impairment is at 29 C.F.R. § 1630.2(h).

ii. But the impairment (whether actual or perceived) cannot be something that is both transitory and minor. Page 8 lines 16–17.

(1) "Transitory" means lasting less than six months. Page 8 lines 17–19.

(2) The term "minor" is not defined in the statute, but the legislative history suggests that it refers to trivial impairments.[12]

b. A regarded-as disability will not support a failure-to-accommodate claim. Page 14 lines 11–19.[13]

i. In creating this exception, Congress expressed confidence that individuals who need accommodations or modifications will receive them because those individuals will now qualify for coverage under the first or second prongs (under the less demanding interpretation of "substantial limitation"). Managers Statement, 154 Cong. Rec. at S8842 (Act does not create "an onerous burden for those seeking accommodations or modifications"); Statement of Rep. Miller, 154 Cong. Rec. at E1841; Statement at Rep. Nadler, 154 Cong. Rec. at H8290.

ii. But "regarded as" *will* support a claim involving any *other* conduct that violates the ADA. Page 8 lines 8–15.

4. Examples of Disabilities—Among the conditions referenced in the legislative history as disabilities are epilepsy, diabetes, muscular dystrophy, amputation, intellectual disabilities, multiple sclerosis, cancer, head trauma, cerebral palsy, heart conditions, mental illness, HIV, immune disorders, liver disease, kidney disease, dyslexia, and learning disabilities.

[12] *See* H.R. Rep. 110-730, Pt. I, 110th Cong., 2d Sess., at pp. 14, 18, 30 (June 28, 2008); Joint Statement by Reps. Hoyer and Sensenbrenner, 154 Cong. Rec. at H6067 (June 25, 2008) ("common cold"); Statement of Rep. Nadler, 154 Cong. Rec. at H6064 (June 25, 2008) ("stomachaches, the common cold, mild seasonal allergies, or even a hangnail"); Statement of Rep. Smith, 154 Cong. Rec. at H6074 (June 25, 2008) ("trivial impairments such as a simple infected finger"); *id.* ("stomach aches, a common cold, mild seasonal allergies, or even a hangnail").

[13] *See also* Statement of Rep. Miller, 154 Cong. Rec. at E1841 ("reasonable accommodations or modifications do not need to be provided for those individuals who qualify for coverage only because they have been 'regarded as' having a disability.").

5. Other issues

a. **Authority to issue regulations**—The Act clarifies that the authority to issue regulations implementing the Act's definition of disability is granted to the EEOC, DOJ, and DOT. Page 15, lines 3–9.[14]

b. **Rehabilitation Act conformed**—The Act changes the definition of disability for claims under the Rehabilitation Act of 1973 to conform to the above. Page 15 line 20–page 16 line 7.[15]

c. **Effective Date**—"This Act and the amendments made by this Act shall become effective on January 1, 2009." Page 16 lines 8–10.

[14] *See also* Managers Statement, 154 Cong. Rec. at S8843. This change responds to the Supreme Court's hesitation to accept EEOC regulations defining disability. *See, e.g., Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184, 194 (2002).

[15] The Department of Education may also draft new regulations consistent with the Act. Managers Statement, 154 Cong Rec. at S8843.